UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:08-HC-2183-BO

UNITED STATES OF AMERICA v. THOMAS HEYER	SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FILED ON JUNE 24, 2010

The respondent, THOMAS HEYER, by and through undersigned counsel, respectfully submits this supplemental memorandum and asks this Honorable Court for an order dismissing the pending 18 U.S.C. § 4248 proceeding. In this pleading, Mr. Heyer challenges the constitutionality of the 18 U.S.C. § 4248 certificate filed on December 18, 2008. Wherefore, Mr. Heyer shows the Court the following:

FACTS

In 2002, Mr. Heyer pled guilty to one count of possessing child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B); he received a 60-month sentence followed by a three-year term of supervised release. Upon revocation of his supervised release on October 1, 2007, Mr. Heyer received an 18-month prison sentence; he did not receive another term of supervised release. Mr. Heyer's BOP release date for his revocation sentence was January 9, 2009. On December 18, 2008, Mr. Heyer was certified under 18 U.S.C. § 4248 as a sexually dangerous person; he has remained in custody since that time as a pre-trial detainee.

ARGUMENT

The 18 U.S.C. § 4248 certification process violates the Equal Protection Clause, and the Fifth and Sixth Amendments.

This case should be dismissed because the certification process violates the Equal Protection Clause, the Fifth and Sixth Amendments and because the certificate does not properly establish that Respondent has a mental illness and is sexually dangerous.

First, the certification process violates the Equal Protection Clause.[1] If a classification does not bear a rational relationship to the government purpose allegedly addressed by the classification, then the classification violates the constitutional guarantee of equal protection of the law. *Burlington N. R.R. v. Ford*, 504 U.S. 648, 653 (1992).[2] The government has not provided any indication that it is reviewing every individual "in the custody of the Bureau of Prisons" upon their release to determine whether to certify them under § 4248. Accordingly, Respondent, and this Court, have no way of knowing whether the government is certifying individuals in a completely arbitrary manner in violation of equal protection. Simply put, the government cannot arbitrarily classify individuals, and any arbitrary certification cannot be used to keep Respondent detained. Without any information about the government's certification process--and no way to learn about it--Respondent asserts that his certification must fail as arbitrary and in violation of equal protection.

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[1]Classifications that would violate the Fourteenth Amendment's Equal Protection Clause violate the Fifth Amendment's Due Process Clause as a matter of law. *See Johnson v. Robison*, 415 U.S. 361, 364 n.4 (1974). Respondent's argument, therefore, derives from the Due Process Clause of the Fifth Amendment, though he discusses it in terms of the Equal Protection Clause.

[2]"[T]he Supreme Court has not squarely addressed the appropriate level of scrutiny to apply to civil commitment statutes." *Hubbart v. Knapp*, 379 F.3d 773, 781 (9th Cir. 2004). Because the liberty interest implicated by indefinite commitment strikes at the "heart" of the Due Process Clause, *Zadvydas* 533 U.S. at 690, it implicates a fundamental right and heightened scrutiny should apply. Respondent, therefore, asserts that this Court should apply heightened scrutiny to his equal protection claim. Respondent will, however, argue as though rational basis scrutiny applies in order to demonstrate that the government's arbitrary classification system violates any level of scrutiny.

Second, the certification in this case initiates criminal, and not civil, proceedings *See* Order Granting Habeas Corpus in No. 5:08-HC-02160-BO , *Timms v. Johns* (D.E. 47, EDNC, March 31, 2010)(on appeal in the Fourth Circuit as No. 10-6496). As such, it violates Respondent's Fifth and Sixth Amendment rights to a grand jury, to a speedy and public trial, and to be informed of the nature of the charges against him. While the criminal nature of § 4248 proceedings, of course, creates several essential problems with the entire statutory scheme, *see id.*, it is worth noting that these root-and-branch problems affect the very certification itself.

Third, the certificate does not establish, as required, the requisite mental illness and dangerousness required by the statute and by due process. The science upon which the certificate relies simply cannot and does not demonstrate that Respondent must be detained. *See generally* Brief of the NACDL and Nat'l Assn. Of Fed. Defenders as Amicus Curiae Supporting Respondents, *United States v. Comstock*, 130 S. Ct. 1949 (2010), 2009 WL 3727683. Accordingly, the certificate does not make the requisite showing, and this proceeding must be dismissed.

CONCLUSION

For the reasons stated above, Mr. Heyer asks this Court to dismiss the 18 U.S.C. § 4248 proceeding and order his immediate release so that he may start his term of supervised release.

Respectfully requested this 3rd day of December, 2010.

/s/ Thomas P. McNamara
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served upon:

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by electronically filing the foregoing with the Clerk of Court on December 3, 2010, using the CM/ECF system which will send notification of such filing to the above.

This the 3rd day of December, 2010.

/s/ Thomas P. McNamara
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